

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/Cross-Appellant,

v

SHALONDA RENEE CLEVELAND,

Defendant-Appellant/Cross-  
Appellee.

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UNPUBLISHED

March 21, 2006

No. 258199

Jackson Circuit Court

LC No. 04-000678-FH

Before: Smolenski, P.J., Whitbeck, C.J., and O'Connell, J.

PER CURIAM.

Defendant appeals as of right from her bench trial conviction of perjury, MCL 750.422. The trial court found that defendant had not sustained her asserted legal defense of duress. The court sentenced her to 365 days in jail. We affirm.

This case arose when detectives from the Jackson County Sheriff's Office, who were investigating a robbery, were led to defendant by a confidential informant tip. Officers approached defendant and questioned her about the robbery and she told them that Duquan Hall had admitted to her that he had committed the robbery and she gave several details of the robbery that the officers were able to later confirm. Before Duquan's preliminary examination, defendant told the Jackson County officer she had originally interviewed with that she wasn't going to testify. She told him that she had received threatening phone calls where the caller threatened to "hurt" her if she testified. She also told the prosecutor's investigator that she had seen one of Duquan's associates and that had left her in fear. At the preliminary examination, she testified under oath that she had not given the officers any information and denied knowing any information about the robbery and she was later charged with perjury.

Defendant first contends that the trial court committed error warranting reversal when it found that defendant was not acting under duress. We disagree. The findings of fact by a trial court sitting without a jury are reviewed for clear error. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000); MCR 2.613(C). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Walters, supra* at 456. "A successful duress defense excuses the defendant from criminal responsibility for an otherwise criminal act because the defendant was compelled to commit the act; the compulsion or duress overcomes the defendant's free will and his actions lack the required *mens rea*." *People v Luther*, 394 Mich

619, 622; 232 NW2d 184 (1975). In order to properly assert the defense, a defendant must present some evidence from which the jury can conclude that,

- A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
- B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
- C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
- D) The defendant committed the act to avoid the threatened harm. [*Id.* at 623.]

The only evidence of duress presented was defendant's statement that she had received threatening phone calls. She gave no specifics about the nature of the threatening calls, didn't file a police report, didn't remember when she got the calls, and deleted the caller identification records from her phone. She also refused police assistance. Although she reported having seen an associate of Duquan's, which she said placed her in fear, she did not report that the individual made any overt threats. Further, defendant would not give this individual's name or give a description of him. Therefore, there was no evidence presented that would create in the mind of a reasonable person a fear of imminent death or serious bodily harm. Therefore, defendant failed to meet her burden of producing a prima facie defense of duress. *Luther, supra* at 623; *People v Ramsdell*, 230 Mich App 386, 401; 585 NW2d 1 (1998).

Defendant next argues that her conviction must be reversed where the trial court did not articulate specific and sufficient findings of fact and conclusion of law to support its conclusions. We disagree.

Whether the trial court complied with the requirements of a court rule is a question of law that is reviewed de novo. *Haliw v City of Sterling Heights*, 471 Mich 700, 704; 691 NW2d 753 (2005). In actions tried without a jury, the trial court must find the facts and state separately its conclusions of law as to contested matters. MCR 2.517(A)(1); MCR 6.403; *People v Feldmann*, 181 Mich App 523, 534; 449 NW2d 692 (1989). This requirement serves the purpose of allowing the appellate court to review the law applied by the factfinder. *People v Armstrong*, 175 Mich App 181, 184; 437 NW2d 343 (1989). Findings are sufficient if it appears that the trial court was aware of the issues in the case and correctly applied the law. *People v Smith*, 211 Mich App 233, 235; 535 NW2d 248 (1995).

The trial court outlined each of the elements of duress. It then recited from the applicable jury instructions and considered the various factors suggested there, such as defendant's demeanor when she was refusing to testify (crying and upset), Duquan's background (not part of an organized gang), and the character of the underlying crime (robbery committed with a knife, but with no injuries, not particularly brutal). The trial court then gave its findings that there was no specific threat that would put a reasonable person in fear of death or serious bodily harm and defendant had therefore failed to successfully assert a defense of duress. The trial court clearly and specifically found the facts, and then stated its conclusions of law, thereby fulfilling the mandate of MCR 2.517(A)(1).

Defendant next argues on appeal that her constitutional rights were violated by the prosecutor's remarks during closing that defendant had not testified. We disagree. We review claims of prosecutorial misconduct on a case-by-case basis, "examining the remarks in context, to determine whether the defendant received a fair and impartial trial" and "[n]o error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001) (citation omitted).

Taken in context, it is apparent that, although the prosecutor used the word "testimony," he was actually referring to statements defendant made to the police in the context of arguing that defendant had not carried her burden of production regarding her duress defense. Further, the trial court specifically noted that it would not consider defendant's failure to testify and trial courts are presumed to know the law and only make decisions based on evidence that was properly admitted. *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). Consequently, there was no error warranting reversal.

Defendant next argues that she was denied a fair trial where the prosecutor referred to facts not in evidence during his opening and closing statements. We disagree.

Defendant failed to preserve this issue through objection below. An unpreserved constitutional error is subject to review for plain error that affected substantial rights. *People v McNally*, 470 Mich 1, 5; 679 NW2d 301 (2004). To have affected substantial rights, an error must usually have caused prejudice in that it affected the outcome of the proceedings. *Id.* The defendant must show that there was prejudice either because of the conviction of an innocent defendant or because the error seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id.* Prosecutors may not make statements of fact that are unsupported by the evidence. *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001).

The prosecutor mentioned that Duquan was defendant's sister's boyfriend once during opening argument and four times during closing. Defendant contends reversal of her conviction is warranted because the remarks suggested that this was the actual reason she didn't want to testify against Duquan, and the trial court relied on that when it found that defendant refused to testify merely because she "had a change of heart" rather than due to duress. Although the prosecutor impermissibly referred to a fact not in evidence, and the trial court alluded to that fact to determine defendant "had a change of heart" about testifying, the error was harmless because defendant failed to meet her burden of producing some evidence of duress to meet the requirements for a prima facie case. Therefore, the outcome here would have been the same without the prosecutor's statements, and the error was harmless. *People v Elkhoja*, 251 Mich App 417, 450; 651 NW2d 408 (2002), vacated in part on other grounds 467 Mich 916 (2003).

Defendant next argues on appeal that the trial court violated her due process rights by scoring OV 19 and increasing the statutory sentencing guideline range based on alleged facts, which the prosecutor did not charge and prove beyond a reasonable doubt. Any error was extinguished when defendant waived the issue during sentencing by affirmatively stating she had no objections to the guidelines as scored. *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000).

Finally, on cross-appeal plaintiff contends that the enumerated reasons given by the trial court for downward departure for defendant's sentence were not substantial and compelling reasons to deviate below the guidelines. We disagree.

When a trial court imposes a sentence that departs from the guidelines, it must state on the record the substantial and compelling reasons for departure. MCL 769.34(3); *People v Babcock*, 469 Mich 247, 258, 260; 666 NW2d 231 (2003). Only reasons that are objective and verifiable may be used to judge whether substantial and compelling reasons for departure exist. *Id.* at 257. Whether a given reason exists is a factual question reviewed for clear error, whether it is objective and verifiable is reviewed de novo, and whether it is substantial and compelling is reviewed for an abuse of discretion. *Babcock, supra* at 264-265. “[T]he reasons justifying departure should ‘keenly’ or ‘irresistibly’ grab our attention, and we should recognize them as being ‘of considerable worth’ in deciding the length of a sentence.” *Id.* at 257, quoting *People v Fields*, 448 Mich 58, 67; 528 NW2d 176 (1995).

The trial court listed four reasons for departing from the 19 to 38 month sentencing guidelines range in this case: (1) defendant recently delivered a child; (2) defendant's perjury consisted of failing to tell what she knew about a crime rather than falsely stating details that would implicate the wrong person; (3) defendant had been influenced and pressured by members of the community not to testify, although that pressure did not amount to duress; and (4) a prison sentence seemed disproportional to the offense. The first reason given by the trial court, that defendant recently delivered a child, exists and is objective and verifiable. However, a child being without a parent during the term of sentence is not a substantial and compelling reason for departure. *People v Pearson*, 185 Mich App 773, 779; 462 NW2d 839 (1990). The second reason given, the less-serious nature of defendant's perjury, is objective and verifiable, and is a substantial and compelling reason for departure. See *People v Kowalski*, 236 Mich App 470, 474; 601 NW2d 122 (1999). The third reason given, defendant's incomplete defense of duress, exists, is objective and verifiable, and is also a substantial and compelling reason for departure. See *People v Downey*, 183 Mich App 405, 411; 454 NW2d 235 (1990) (noting that some states treat duress as a fact of the crime that mitigates culpability), criticized on other grounds by *People v Krause*, 185 Mich App 353, 358; 460 NW2d 900 (1990). Finally, the fourth reason given, the sentence seemed disproportional to the offense, in actuality is not a reason for departure, because whether a sentence is disproportionate takes into account considerations of fairness, which is a subjective inquiry rather than objective and verifiable. Consequently, only two of the factors given by the trial court for downward departure were appropriate. However, if multiple reasons are given for departure, only some of which are appropriate, it must be decided whether the trial court would have departed to the same extent it did considering only those factors. *Babcock, supra* at 271. The trial court clearly stated that “[i]f any of these reasons are found to be substantial and compelling, I would order this sentence.” Therefore, the trial court would have departed to the same extent considering only the appropriate factors. Consequently, it is not necessary to remand for resentencing.

Affirmed.

/s/ Michael R. Smolenski  
/s/ William C. Whitbeck  
/s/ Peter D. O'Connell